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**FILED**

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NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

JOHNNY RAY WOLFENBARGER,

*Defendant.*

Case No. 5:16-cr-00519-LHK-1

**MOTION TO FILE BRIEF OF  
AMICI CURIAE ELECTRONIC  
FRONTIER FOUNDATION AND  
AMERICAN CIVIL LIBERTIES  
UNION, AND AMERICAN CIVIL  
LIBERTIES UNION  
FOUNDATION OF NORTHERN  
CALIFORNIA IN SUPPORT OF  
DEFENDANT'S REQUEST FOR  
LEAVE TO FILE MOTION FOR  
RECONSIDERATION**

Hon. Lucy H. Koh

Case No. 16-cr-00519-LHK-1

MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES ISO BRIEF OF AMICUS CURIAE  
ELECTRONIC FRONTIER FOUNDATION, ACLU, AND ACLU FOUNDATION OF NORTHERN CALIFORNIA

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## MEMORANDUM OF POINTS AND AUTHORITIES

The Electronic Frontier Foundation (“EFF”), American Civil Liberties Union (“ACLU”), and ACLU of Northern California respectfully move for leave to file an amici curiae brief in the above-captioned matter. Amici conferred with both parties prior to filing this motion. Mr. Wolfenbarger has consented to the filing. The Government represented that it does not consent and will oppose any motion to reconsider the Court’s rulings on the motions to suppress.

### ARGUMENT

EFF and ACLU have previously participated as amicus in this Court. *See, e.g., In re Application of the United States for Telephone Information Needed for a Criminal Investigation*, No. 5:15-xr-90304-HRL (LHK), ECF No. 12, 13 (N.D. Cal. June 5, 2015) (Koh, J.) (granting EFF’s motion for leave to participate as amicus); *United States v. Spencer*, No. 3:17-cr-00259-CRB, ECF No. 76 (N.D. Cal. Apr. 18, 2018) (Breyer, J.) (granting EFF’s motion for leave to participate as amicus).

“The district court has broad discretion to appoint amici curiae.” *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds as recognized in Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017). “District courts frequently welcome amicus briefs from nonparties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 335 F. Supp. 2d 1016, 1067 (N.D. Cal. 2005) (internal citations and quotation omitted).

Amici’s participation is warranted in this case on both counts.

First, the matter at issue before this Court—the scope of Fourth Amendment protection for email stored with a third party provider—has “potential ramifications beyond the parties involved.” *Id.* Hundreds of millions of Americans use third-party email providers, and thus their Fourth Amendment rights are implicated by the Court’s order on the defendant’s motion to suppress.

Second, amici have “unique information or perspective that can help the court.” *Id.* As a member-supported, non-profit civil liberties organization, EFF represents interests separate and

1 distinct from any of the parties to the case. Founded in 1990, EFF has over 30,000 donors and  
2 dues-paying members across the United States. EFF represents the interests of its members, and  
3 technology users more broadly, in both court cases and broader policy debates surrounding the  
4 application of law in the digital age. EFF regularly participates as amicus in the Supreme Court, the  
5 Ninth Circuit, and other courts in cases addressing the Fourth Amendment and its application to  
6 new technologies. *See, e.g., Carpenter v. United States*, 137 S. Ct. 2211 (2017); *Riley v. California*,  
7 134 S. Ct. 2473 (2014); *City of Ontario v. Quon*, 560 U.S. 746 (2010); *United States v. Wilson*, No.  
8 18-50440 (9th Cir.); *United States v. Ackerman*, No. 27-3238 (10th Cir.); *United States v. Warshak*,  
9 631 F.3d 266 (6th Cir. 2010). Moreover, EFF has specific knowledge and experience with this  
10 question, though its participation as amicus in the leading appellate cases presenting similar issues:  
11 *Wilson*, *Ackerman* and *Warshak*.

12 Similarly, the ACLU is a nationwide, nonprofit, nonpartisan organization with more than  
13 two million members and supporters dedicated to the principles of liberty and equality embodied in  
14 the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has  
15 frequently appeared before the Supreme Court and other federal courts in numerous cases  
16 implicating Americans' right to privacy, including as counsel in *Carpenter v. United States*, 138 S.  
17 Ct. 2206 (2018), and as amicus in *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010). The  
18 -ACLU of Northern California is a state affiliate of the national ACLU.

19 Amici respectfully submit that their unique perspective and experience with cases of this  
20 type will assist the Court in its consideration of this important issue. For these reasons, they  
21 respectfully ask the Court to grant leave to file the accompanying Brief of Amici Curiae in Support  
22 of Defendant's Request for Leave to File Motion for Reconsideration.

1 Dated: November 1, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2019, I submitted for filing the foregoing with the Clerk of the Court and caused to be served by U.S. Mail, postage thereon fully prepaid, a true and correct copy of the foregoing on:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Dated this 1st day of November, 2019.

/s/ Jennifer Lynch  
Jennifer Lynch